

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIAM DRAKE

PLAINTIFF

VS.

CIVIL NO. 1:95CV177-JAD

ADVANCE CONSTRUCTION SERVICES, INC.,
and ARROW CONSTRUCTION, INC.

DEFENDANTS

MEMORANDUM OPINION

William Drake has sued Advance Construction Services, Inc., and Arrow Construction, Inc., contending that he was terminated from his position as Chief of Quality Control with Arrow because he filed accurate deficiency reports with the United States Corps of Engineers contrary to the instructions of his supervisor. Defendants have moved for summary judgment claiming he has stated no cause of action cognizable under Mississippi law. After review of the briefs of the parties and documents offered in support of these briefs, the court is of the opinion that defendants' motion for summary judgment is well taken and should be **granted**.

Arrow was awarded a government contract to perform certain channel improvements at Luxapalila Creek near Columbus MS in 1994. Although a portion of that job was subcontracted to Four F Construction of Memphis TN, Arrow remained responsible for laying the filter cloth, bedding material and rip-rap to prevent erosion and to insure proper drainage along the channel. Plaintiff was hired in July 1994. As part of his duties, plaintiff was required to file with the Corps quality control reports, a daily diary, of the work performed on the job. In these reports plaintiff was to note if the work on the project was not meeting Corps specifications, then notify Arrow of such deficiencies and suggest and oversee corrective measures. According to plaintiff, problems arose with the laying of the rip-rap, and on December 20, 1994, Drake filed a deficiency notice in his report to the Corps claiming that the rip-rap was improperly placed. The rock, according to that report, was being dropped from heights greater than the three-foot maximum set forth in the plans and specifications, causing displacement of the bedding stone. A similar report was filed the following day, December 21. On December 22 the Corps sent Arrow a letter informing the company it should

not resume work until Arrow representatives met with the Corps concerning the project. That same day, plaintiff was fired for "insubordination" according to the company, for giving notice to the Corps of the deficiency reports according to Drake.

Drake concedes that he was an "at will" employee, hence, subject to dismissal for any reason or no reason in this State. Kelly v. Mississippi Valley Gas Co., 397 So.2d 874 (Miss. 1981). He contends, rather, that his firing for refusing to compromise his daily reports to the Corps is contrary to public policy of the State of Mississippi. In McArn v. Allied Bruce-Terminix Co., 626 So.2d 603, 607 (Miss. 1993), the Supreme Court of Mississippi held that when an employee is discharged for refusing to participate in an illegal act or for reporting the illegal acts of his employer, the employment at will doctrine would not bar an action in tort for wrongful discharge. Drake deems his termination a discharge for refusing to participate in an illegal act.

Assuming that Drake's version of the discharge is true, that is, that he was terminated for giving notice of deficiencies to the Corps contrary to the direction of his superior, Bob Najor, he has not established a cause of action under the public policy exception. Deliberate failure to note a deficiency in the placement of rip-rap, while perhaps unprofessional or immoral, is not an illegal act. According to Drake's own testimony, a representative of the Corps was on duty at the work site and noted the deficiency at the same time Drake did. He spoke to the superintendent and the workers handling the rip-rap. "He said that we can't be doing that. You know, he wasn't going to pay for it." (Drake deposition, 3/12/96, p. 138). The deficiencies noted in those two reports caused the Corps to halt the work for a meeting with the company officials. A test was made, and the work apparently was found to be acceptable, and within a few days the company was allowed to resume rip-rap placement. (Najor deposition, 4/10/96, p. 200).

The deficiencies at issue related solely to the manner in which the project was being performed. The Corps constantly monitors its projects, and when a deficiency is noted (not an uncommon occurrence), the contractor is required to bring the job up to contract standards before payment. Arrow never charged for labor it did not perform or for materials it never used. Nothing about this incident was illegal. Consequently, Drake has failed to state a cause of action, and

summary judgment will be granted for the defendants. A judgment in accordance with this opinion will be entered separately.

This _____ day of August, 1996.

UNITED STATES MAGISTRATE JUDGE